

SARJIT SINGH KHAIRA

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v.

DATUK FONG JOO CHUNG & ORS

HIGH COURT SABAH & SARAWAK, KUCHING

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MUHAMMAD KAMIL AWANG J

[SUIT NO: 22-25-96-1]

8 JUNE 1999

CIVIL PROCEDURE: Costs - Bill of costs - Getting-up fee - Taxation - Item drawn up to RM37,000 - Taxed to RM2,000 - Whether taxation justified - Proper guidelines - Subject matter and amount at stake - Importance of issues of involved - Rules of High Court 1980, O. 59, Appendix 1, part IV, item 26

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This was an appeal against the decision of the learned Senior Assistant Registrar for taxing down the plaintiff's getting-up fee from RM37,000 to RM2,000 on the ground that the plaintiff's application, being an application to set aside a defence and a counterclaim, was a simple application and therefore deserved negligible costs. The facts showed that the counterclaim in question was directed not only against the plaintiff but also against the plaintiff's counsel ('the second defendant' by counterclaim) alleging *inter alia* that the latter had maliciously published defamatory words against the first respondent. The main issue that arose was whether the learned Registrar was right in so taxing the fee and in ruling the way he did.

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Held:

[1] The setting aside of the service of the defence and counterclaim against the 2nd defendant means the whole process was annulled. It meant setting aside of the pleading and it is a final order, and not an interlocutory order. The Senior Assistant Registrar was wrong in holding that such an application to set aside the service of defence and counterclaim was a simple application.

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[2] In determining the getting-up fee, the taxing officer should be chiefly guided by the amount at stake and the importance of the issues involved as established in *AE Beavis v. Foo Chee Fong*. The guidelines provided for Item 26 of the Part IV Appendix 1 of O. 59 of the Rules of the High Court 1980 ('RHC') must be followed.

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- a** [3] The learned Senior Assistant Registrar had not followed the guidelines, had totally ignored Item 26 of the Part IV Appendix 1 of O. 59 of the RHC and had exercised his discretion wrongly. Further, the learned Senior Assistant Registrar did not seem to have appreciated the subject matter at stake and the importance of the issues involved. The learned Senior Assistant Registrar had also acted on wrong principle and had therefore erred in law.

- b** [4] The damages and aggravated damages claimed against the plaintiff and the 2nd defendant were unlimited in amount. More importantly, the threat to have the 2nd defendant (by counterclaim) struck off the Bar must have forced the latter to undertake a lot of work and research in the preparation to defend himself. Added to that, there was also the agony that the second defendant had to go or gone through. The proper and reasonable sum for getting-up fee in this case is RM20,000.

- c** [Registrar's order set aside; Registrar's certificate to be amended accordingly.]

Case(s) referred to:

AE Beavis v. Foo Chee Fong [1938] MLJ 124 (*refd*)

Chin Cham Sen v. Foo Chee Sang & Anor [1952] 18 MLJ 99 (*refd*)

Ratnam v. Cumarasamy & Anor [1965] MLJ 228 (*refd*)

- d** *Slingsby v. A-G* [1918] P236 (*refd*)

Yii Suok Ting v. Sibu Municipal Council [1995] 4 CLJ 108 (*refd*)

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 3(4)(a), 59

- e** *For the plaintiff - TO Thomas; M/s Thomas & Co*

For the defendants - Stanley Eddy; M/s Battenberg & Talma Advoc

Reported by Farah Naim

JUDGMENT

- f** **Muhammad Kamil Awang J:**

The Notice of Taxation came before the learned Senior Assistant Registrar and the item 40 – Getting Up fee at RM37,000 was taxed down to RM2,000. On an application for a review of taxation there had been no change, thus the applicant appealed against the decision of the Senior Assistant Registrar on this matter.

Learned Senior Assistant Registrar in a written judgment in this respect states that:

- g** The getting-up claimed amounting to RM37,000 was not justified was astronomical as costs were allowed by Yang Arif only for the application.

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Brief Background Facts Of The Case

The plaintiff joined the Sarawak Civil Service in 1961. In 1975 he accepted an offer of appointment by transfer to the post of senior accounting officer in the Public Works Department (PWD), Simanggang and in 1979 he was transferred to PWD Headquarters in Kuching. On 28 April 1987 he was informed of an arranged transfer to the State Treasury Limbang. He appealed but was unsuccessful. The Public Service Commission later dismissed him.

The plaintiff was successful in obtaining an order of *certiorari* to quash the order of dismissal, and on appeal, it was upheld by the Court of Appeal in [1999] 1 MLJ 618.

The action took a new turn when the 1st defendant, acting originally as the counsel for the defendants alleged that the plaintiff's post was invalid, and that the plaintiff was holding an invalid post. The plaintiff filed a writ in 1996 against the defendants for declarations, *inter alia*, that:

- (1) 1st defendant "Fong Joo Chung concocted the false story of invalidity of the plaintiff's appointment as Senior Accounting Officer, was/is true" and that "the 1st defendant maliciously concocted the story of invalidity ... in the hope of defeating, by hook or by crook, the plaintiff's application for the Order of *Certiorari*."
- (2) A declaration that the 2nd defendant acted *ultra vires* his powers and in bad faith, knew/ought to have known that the accusation that the 1st defendant falsely concocted the story of invalidity of the plaintiff's appointment as Senior Accounting Officer.
- (3) A declaration against the 3rd defendant was not competent or *ultra vires* his powers to falsely instruct the 1st defendant that the plaintiff's appointment as Senior Accounting Officer was invalid.

The defendants brought a counterclaim against the plaintiff, and his counsel (2nd defendant by counterclaim) alleging, *inter alia*, that the 2nd defendant (by counterclaim) had falsely and maliciously published, against the 1st defendant, defamatory words contained in a letter dated 11 August 1995 to the 3rd defendant and the Public Service Commission. The said words meant that 'the 1st defendant had been dishonest in practice of his profession and as State Attorney General, and had acted dishonourably, as preferred to concoction to the truth' (para 26(a)). A series of actions ensued between the parties. In the present Suit No. 22-25-96-I, it was alleged by the defendants that the plaintiff, in collusion with the 2nd defendant (by counterclaim) have filed proceedings with a view to harass, embarrass, prejudice, intimidate and cause injury or damage to the defendants (by original action). The 1st

- a* defendant claims against the plaintiff and 2nd defendant (by counterclaim) for libel, aggravated damages and an order that the 2nd defendant (by counterclaim) be struck off or fined or censured or disciplinary action be taken against him and an injunction to restrain the plaintiff and 2nd defendant (by counterclaim) from publishing any similar libel upon the 1st defendant.
- b* The plaintiff filed a reply and defence to the counterclaim.
- The defendants' counterclaim was set aside, and taxed costs were awarded to the plaintiff and 2nd defendant (by counterclaim). The Notice of Taxation was filed and heard by the Senior Assistant Registrar. This is an appeal against
- c* the Senior Assistant Registrar's decision on item 40, ie, the getting-up fee.
- Learned counsel Mr. T.O. Thomas submitted that the learned Senior Assistant Registrar was wrong in law, that the order for costs in respect of an application and that by reason of it being an application it was negligible. It appeared that he was misled by the defendants' counsel's submission that "Thomas
- d* remains a party to the action". Mr. Thomas further submitted that by virtue of O. 15 r. 3(4)(a) Rules of the High Court 1980 the counterclaim in the case was as good as a writ.
- Learned counsel, Mr. Stanley Eddy agreed with Mr. Thomas that "set aside"
- e* means annulled. But he asserted that Mr. Thomas is still a party in this case as there is nothing in the Order about striking out the 2nd defendant (by counterclaim) as a party. No authority cited for this contention.
- With respect, the setting aside of the service of the defence and counterclaim
- f* against the 2nd defendant (by counterclaim) means the whole process was annulled. It meant the setting aside of a pleading; it is final order, and not an interlocutory order (see encl. 77).
- Implicitly, by setting aside the pleading, ie, defence and counterclaim it is
- g* apparent that Mr. Thomas cannot be a party to the main action although there is nothing in the Order about striking the 2nd defendant (by counterclaim) as a party.
- The law applicable in this taxation case is item 26, Part IV, Appendix 1 of O. 59, which reads:
- h* 26. Instructions for trial or hearing of any cause or matter, whatever the mode of trial or hearing.
- The subject matter of the Bill of Costs is a 'matter', submitted by Mr. Thomas, that the nomenclature makes no difference for the purpose of costs – what
- i* matters is the value and importance of the issues involved.

This is an action without precedent. Mr. Thomas had undoubtedly carried out extensive research on case law of countries like England, USA, Australia and India on this unusual action, whereby the 1st defendant had claimed against the 2nd defendant (by counterclaim) the following:

- a) Damages for libel (unlimited)
- b) Aggravated damages (unlimited)
- c) An order that the 2nd defendant (by counterclaim) be struck off, suspended or fined or censured or such disciplinary action be taken against him under the Advocates Ordinance.

Alternatively, against the 1st and 2nd defendant (by counterclaim) for the following reliefs:

- a) Damages for conspiracy;
- b) Aggravated damages;
- c) An order against the 2nd defendant (by counterclaim) struck off, etc.;
- d) A restraint order; and
- e) Costs.

In *Chin Cham Sen v. Foo Chee Sang & Anor* [1952] 18 MLJ 99 Thomson J (as he then was) said that in allowing the amount for getting-up fee the taxing officer should be chiefly guided by the amount at stake and the importance of the issue involved. In that case, the appellant was dissatisfied with the decision of the Rent Assessment Board, took steps to have it quashed by way of *certiorari*. To that end he commenced proceedings by notice of motion dated 3 December 1951. On 27 December 1951 the respondent's solicitors said that they would not be proceeding further in the matter and that the application for *certiorari* would be withdrawn when it came for hearing on 14 January. The application was duly withdrawn and the appellant was ordered to pay the respondent's taxed costs. Thomson J said (at p. 100):

It is clearly the intention of the Rules that where the taxing officer is given a discretion he must exercise that discretion in a reasonable way so as to make the solicitor a reasonable allowance for the work done by him. The question is not an academic one. It is a practical one of dollars and cents.

It is well settled in England that as a general rule the Court will not interfere with the discretion of a taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after consideration of all the circumstances and if no question of principle arises (see *In The Estate Of Ogilvie*).

- a* In *Slingsby v. Attorney General* [1918] P236, Swinfen Eady LJ (at p. 239) said:

The decision of the taxing Master is not absolutely final even on a question of quantum. For instance, a large sum might be allowed, but from the very fact of the amount the Court might see that the Master, in arriving at so large a sum, must have acted on a wrong principle or have taken something into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the Court, but exceptional cases do occasionally arise.

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- c* In *A.E. Beavis v. Foo Chee Fong* [1938] MLJ 124 where it was held that the getting-up fee should bear some relation to the amount, and the importance of the issue involved. He said:

In arriving at the amount of the getting up fee I do not think it desirable to enquire from Counsel the number of days and hours during which he was engaged in the work. I think it is almost impossible to give a correct answer. The proofs of witnesses are of course relevant, and so are the issues of law involved, but I think a taxing master should be chiefly guided, as I have said, by the amount at stake and the importance of the issues involved.

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- e* The application by the plaintiff and 2nd defendant (by counterclaim) to set aside the defence and counterclaim was granted by this court (encl. 77), and there had been no appeal. In my view, making the counsel of the plaintiff to be a party by a counterclaim is not only unprecedented, but unwise and unnecessary as in this case; it is a waste of time and money.

- f* The guidelines provided for item 26 of Part IV Appendix 1 of O. 59 must be followed. They read as follows:

Note to item 26

These items are intended to cover the doing of any work, not otherwise provided for, necessarily or properly done in preparing for a trial, hearing or appeal, or before a settlement of the matters in dispute, including:

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- a) taking instruction to sue, defend, counterclaim or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or claim in a reference under O. 70 r. 39;

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- b) considering the fact and law,
c) attending on and corresponding with client;
d) interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;

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- e) arranging to obtain reports or advice from experts and plans, photographs and models;

- f) making search on a Government Office and elsewhere for relevant documents; **a**
- g) inspecting any property or place material to the proceedings;
- h) perusing pleadings, affidavits and other relevant documents;
- i) where the cause or matter does not proceed to trial or hearing, work done in connection with the negotiation of a settlement; and **b**
- j) the general care and conduct of the proceedings.

The Senior Assistant Registrar had not followed these guidelines, and he had exercised his discretion wrongly. He had ignored totally Item 26 above. There was no reference made to item 26 in his written judgment; he simply said that it was an application to set aside the service of the defence and counterclaim. The attempt by the defendants to make the 2nd defendant (by counterclaim), who was acting as counsel for the plaintiff, failed in this unprecedented application. This is crucial. Mr. Thomas had undertaken a lot of work, research in the preparation to defend himself. It matters not that the hearing of the counterclaim was nipped in the bud, nevertheless he had done work in anticipation of it. I think he is entitled to be paid for that work. See *Chin Cham Sen's case (supra)*. **c**

The Senior Assistant Registrar seemed not to have appreciated the subject matter at stake and the importance of the issue involved. The damages and aggravated damages claimed against the plaintiff and 2nd defendant (by counterclaim) were unlimited in amount. More important, the issue of striking out of Mr. Thomas from the Bar. The Senior Assistant Registrar was wrong in holding that it was a simple application regarding the setting aside the service of defence and counterclaim, and failed to consider the subject matter at stake and the importance of the issue involved. As such he had failed to exercise his discretion properly for not considering all the circumstances and questions of principle. Therefore he had acted on a wrong principle or have taken something into consideration which he ought not to have done. Failure to consider matters that ought to be taken into account would mean the registrar has erred in law and that this court can review the exercise of his discretion. See *Ratnam v. Cumarasamy & Anor* [1965] MLJ 228 (PC). As such for item 40, he drastically taxed down from RM37,000 to a mere RM2,000. In my view, it is not a reasonable sum in the circumstances of the case. **d**

In *Yii Suok Ting v. Sibul Municipal Council* [1995] 4 CLJ 108, in a *certiorari* case, the Court held that in view of the importance to a salted vegetable seller, when the council refused to renew the annual permit she had lost a life-line, the trade that she knew all her life. The counsel for the parties carried out **e**

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a exhaustive research as demonstrated by the voluminous materials placed before the court, and the Court held that the getting-up taxed at RM15,000 be enhanced to RM30,000. This was upheld by the Court of Appeal.

b In a more recent case Suit No. KG. 71 of 1993(II) (unreported) it was held that the proper and reasonable sum for the getting-up was taxed down from RM50,000 to RM25,000, taking into account the economic value of the ringgit then. There was no appeal.

c In the instant case, in view of the work and research Mr. Thomas had done to prepare himself against the claim for damages and aggravated damages, more importantly, the threat to have him struck off the Bar, are evidences of an enormous amount of work that ensued. Added to that is the agony of this action that Mr. Thomas had gone through. Though illusory or trivial as it may seem, in my view, it should be taken into consideration. In the circumstances, I think the proper and reasonable sum for getting-up in this case is RM20,000.

d The figure for item 40 is hereby fixed at RM20,000 at 8% p.a. interest from date of judgment. The Senior Assistant Registrar's order is hereby set aside.

The registrar's certificate is to be amended accordingly.

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